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LIMITATION AND PROOF OF POSSESSION IN EJECTMENT SUITS.

[Secretary of State for India *v.* Chelikani Rama Row : I. L. R. 39 M. 617. Kumar Basanta Kumar Roy *v.* Secretary of State for India : 32 M. L. J. 505.]

The decision of the Privy Council in *Secretary of State for India* v. *Chelikani Rama Rao,* [1] requires more than a passing notice, as to its bearing on a rule repeatedly laid down in several decisions of the Madras High Court. The proceedings related to the title to certain islands formed in the sea near the mouth of the Godaveri and the claimants had proved possession of the same for more than twenty years. Relying on the decisions in *Secretary of State for India* v. *Vira Rayan,* [2] *Secretary of State for India* v. *Bavothi Haji,* [3] *The Secretary of State for India* v. *Kota Bapanamma Garu* [4] the High Court held that "though the title was originally in the Crown still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation". The Judicial Committee in holding this view to be erroneous observe, "nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession, * * *. It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession." Their Lordships support this statement of the law by a reference to the decision of the Board in *Radha Gobind Roy* v. *Inglis* [5]; and with reference to the decision in *Secretary of State for India* v. *Vira Rayan* [2] they say, that the

1. (1916) I. L. R. 39 M. 617.
2. (1886) I. L. R 9 M. 175.
3. (1892) I. L. R. 15 M. 315.
4. (1896) I. L. R 19 M. 165.
5. (1880) 7 C. L. R. 364.

facts therein were essentially different and that the ratio of the decision there was found in the historical circumstance peculiar to Malabar, that in that District there is no presumption of state ownership of forest lands. With all respect, we cannot help remarking that this is, to say the least, a very unsatisfactory way of dealing with that case. Reference is no doubt made there to this peculiarity of land tenure in that district and it was not really a case in which the subject had to rely on a *title by prescription*. But the judgment of the High Court is not based on these considerations. The learned Judges attempt to lay down certain general principles and they begin the legal discussion with the following words:—" Assuming that even in Malabar the Crown had the right to oust any person who without its sanction occupied waste land, the question that presents itself for determination at the outset of this case is whether it is competent for the Crown by instituting a suit for a declaration of right or ejectment without specifying a date at which the cause of action arose, to compel a defendant to prove possession for 60 years."

Other decisions of the Madras High Court purporting to follow that in *Secretary of State for India* v. *Vira Rayan* [1] have not been specifically noticed in their Lordships' Judgment. The case in *The Secretary of State for India* v. *Bavotti Haji* [2], was also from Malabar and the question of possession was there material only as raising a *presumption of title* in the claimant. But in the judgment of Best, J., there are some observations touching rather indistinctly on the point of limitation; see also *Nawab Ajajuddin Khan* v. *Secretary of State for India* [3] and *Kambapati Venkatasubbiah* v. *Secretary of State for India* [4]. *The Secretary of State for India* v. *Kota-Bapanamma Garu* [5], was a case from the Godaveri District. There, the finding was against the Crown's title, and the claimant's possession was relied upon only as *prima facie* proof of ownership. But the court went on to add that in such a case Government " must show a *subsisting* title of its own " as contra, distinguished, evidently, from proof merely of antecedent title. This expression as to the obligation to prove a " subsisting title," is repeated in later cases, as well when there is no question of prescriptive title, as when there is one. Thus in *Krishna Iyer* v. *Secretary of State for India* [6], the plaintiff proved possession

1. (1886) I L R 9 M 175
2. (1892) I. L. R 15 M. 315.
3. (1904) I L R. 28 M. 69.
4. (1912) M. W. N. 881.
5. (1896) I L R. 19 M. 165.
6. (1909) I. L. R. 33 M. 173.

for 30 or 40 years. The title put forward by the Crown was held not established. And therefore the further question whether it was a "subsisting one" did not arise at all. In discussing the form of the declaration to be given, the learned Judges held that the long possession shown was sufficient to make out a title even against the Crown and in the course of the judgment, they repeat the rule that in the circumstances shown "the possession of the plaintiff throws upon the defendant the burden of proving that he has a subsisting title". In another case in the same volume *Venkatarama Iyer* v. *Secretary of State for India* the Court (without going into the question of anterior title) decided in favour of the plaintiff on the basis of a right acquired by adverse possession. They held that the adverse possession of the plaintiffs (against Government) for 30 or 40 years was "sufficient to shift to Government the onus of showing that Government has been in possession at some time within 60 years prior to the suit" and in the absence of any such proof "the plaintiff's possession should be presumed to have continued for more than the statutory period." In *Chelikani Rama Rao's Case* [2] the High Court went one step further when they applied the same rule even to a case in which the Crown had the *prima facie* title. It is obvious that the decision in *Venkatarama Iyer* v. *Secretary of State for India* [1], must be taken to be overruled by the decision of the P. C. in *Chelikani Rama Rao's Case* and the dicta in some of the cases referred to above will require reconsideration in the light of the pronouncement of the Judicial Committee. As for *Secretary of State for India* v. *Vira Rayan* [3], the statement as to the burden of proof "being the same as between private parties and the Crown where the existence of a subsisting title in the plaintiff is challenged by a plea of limitation" may be generally accepted, but the interpretation there put upon the decision in *Radha Gobind Roy's Case* can no longer be unreservedly adopted. The way that the learned Judges in that case attempt to reconcile the decision in *Radha Gobind Roy* v. *Inglis* [4] with that in *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nund Lall Singh* [5] is not in accord with later decisions of the Privy Council.

In Mr. Rustomji's book on Limitation there is a long and instructive note on some of the Privy Council decisions bearing

1. (1909) I. L. R. 3[illegible] M. 362.
2. (1908) I. L. R. 33 M. 1.
3. (1886) I. L. R. 9 M. 175.
4. (1880) 7 C. L. R. 364.
5. (1860) 8 M. I. A. 199.

on the question of onus of proof in such cases. But it has not dealt sufficiently with the Madras cases and certain of the observations of the learned writer with reference to some of these cases are not easy to follow. He endeavours to show that the Privy Council cases are all reconcilable if the distinction between those falling under Art. 142 and those coming under Art. 144 is borne in mind. While admitting the force of this distinction as a rough and ready test, we must however say that there are some observations of their Lordships which still create difficulty; and the learned author does not take sufficient notice of the fact that as late as 1899 (in the case in *Innasi Muthu Udayan* v. *Upakarath Udayan* [1]) the Privy Council recognised that even in a case where the question is one of adverse possession by the defendant, it might be possible to argue that "the mere fact of possession (by the defendant) for seven years before suit throws on the plaintiff the burden of showing, when that possession began." It has also to be borne in mind that more than one decision of the Indian High Courts have held that in *all* suits in ejectment, the onus lies upon the plaintiff to prove a subsisting title at the date of the institution of the suit, *Mirza Shamsher Bahadur* v. *Kunj Behari Lal* [2], *Inayat Husain* v. *Ali Husan* [3], *Nazhar Husain* v. *Bohari Singh* [4] and the same *general* language is employed by the Judicial committee in *Mohima Chunder Mozumdar* v. *Mohesh Chunder Neoghi* [5]. In the case in *Raj Kumar Roy* v. *Gobind Chunder Roy* [6], their Lordships refrain from examining the question and prefer to decide the case upon a certain assumption as to burden of proof; and in the latest case on the point *Kumar Basanta Kumar Roy* v. *Secretary of State* [7], in which all the earlier decisions seem to have been referred to in the course of the argument before their Lordships, the Board avoid making a definite pronouncement upon the question of burden of proof and rest their decision on the ground that the evidence in the case was 'sufficient to establish a clear conclusion of fact. As regards *Radha Gobind Roy* v. *Inglis* Mr. Rustomjee regards it as a case falling under the principle of Art. 144, but Dr. Mitra thinks otherwise and he considers both that case and that in *Innasi Muthu Udyan* v. *Upakarath Udayan* [1] to be 'exceptional' and not easily reconcilable with

1. (1899) I. L. R. 23 M. 10.
2. (1907) I. L. R. 7 C. L.J. at p. 420.
3. (1897) I. L. R. 20 A. 182.
4. (1906) I. L. R. 28 A. 760.
5. (1888) I. L. R. 16. C. 473 (P.C.)
6. (1892) I. L. R. 19 C. 660 (P. C.).
7. (1916) I. L. R. 32 M.L.J. 505.

decisions like those in *Maharaja Koonur Baboo Nitrasur Singh* v. *Baboo Nund Lall Singh* [1], *Rajah Saheb Prahlada Sing* v. *Maharajah Rajendar Kishore Singh* [2], *Mohima Chunder Moozumdar* v. *Mohina Chunder Neogi* [3].

Prior to the Limitation Act of 1871, there could have been no difference in this respect between one kind of ejectment suit and another; and it is the introduction of the doctrine of adverse possession as the residuary rule that has led to this differentiation. Whatever may be the difficulty in cases in which a person in possession raises the plea of limitation merely to bar the suit of another, there seems little reason to doubt that when a person out of possession (or whose possession is disturbed) seeks to recover possession (or sustain his possession) on the strength of a *title acquired by prescription*, it will be on him to make out *actual* possession for the full statutory term, *Udit Narain* v. *Golabchand*, [4] *Emmerson* v. *Maddison* [5]. The application of the rule of 'Continuance of possession' or of 'presumitur retro' to such a case is unwarranted; for *ex hypothesi* he was only a trespasser and it is well established that the law would make no *presumptions* in aid of his possession, *Secretary of State* v. *Krishnomoni Gupta* [6].

Analysing the several forms in which the question may arise, the following will be the principal classes of cases.

1. The simple case is that of a plaintiff who is unable to prove title, suing a defendant on the ground of dispossession, the defendant in turn, being also unable to prove any title. Here, of course possession on the one side or the other, is the only ground of title and plaintiff must clearly show that the dispossession complained of was within twelve years of suit.

2. The next case is that of a person with title and possession as well, dispossessed by a person without title. If the dispossessor is in possession and the true owner is obliged to sue in ejectment, the preponderance of authority is certainly in favour of the view that the plaintiff must prove his possession within twelve years before suit. If, however, the true owner somehow gets back into possession peaceably (or even by force, but no suit is brought within the time allowed by S. 9 of the Specific Relief Act) and the disseissor is obliged to go to court, the latter

1. (1860) 8 M. I. A. 199.
2. (1867) 12 M. I. A. at 337.
3. (1888) I. L. R. 16 C. 473.
4. (1899) I. L. R. 27 C. 221.
5. L. R. 1906 A. C. 569.
6. (1902) I. L. R. 29 C. 518.

if he proposes to rely on a prescriptive title, must show not only that he was in possession within 12 years before suit but also that he has, then had actual possession for the full statutory period. In dealing with cases falling under one or other of these two alternatives, certain rules of legal presumption acquire considerable importance, where the evidence as to possession is not clear or conclusive. The ordinary presumption that possession follows title is thus sometimes applied even when there is a question of limitation (cf. *Ranjeet Ram Pandey* v. *Goburdhun Ram Pandey* [1], *Rajkumar Roy* v. *Gobind Chunder Roy* [2], *Rani Hemanta Kumari* v. *Maharaja Jagadindra* [3]. So also the principles of contructive possession and continuity of possession; but these latter are applied only in aid of the true owner but not of the trespasser seeking to make out a title by prescription, *Secretary of State for India* v. *Krishnamani Gupta* [4].

3. The third class of cases are those in which plaintiff sues on the strength of his title without any reference to prior possession or dispossession. In such a case it would seem, that on the proper construction of Art. 144 the plaintiff would be entitled to succeed on proof of his title unless the defendant is able to displace it by proving adverse possession, by himself or his predecessor in title, for the full statutory term. But it is not always easy to decide whether any particular case really comes under Art. 142 or Art. 144, (cf. *Vasudeo Atmaram* v. *Eknath Balakrishna* [4], *Kumar Basant Kumar Roy* v. *Secretary of State for India* [5].

4. Where however the suit is not for possession but for a declaration or an injunction with reference to the title to or possession of land, articles 142 and 144 cannot directly apply and other considerations arise. If the plaintiff is able to prove his title it would seem that he is entitled to succeed. But where he is unable to prove his title and only shows possession, the question arises whether for the purpose of defeating him, the defendant has only to show anterior title at some time or a title subsisting at the date of suit. It may be said that the defendant should not be allowed to improve his position by seeking to disturb the plaintiff's possession, instead of regularly asserting his own right to recover possession.

1. (1873) 20 W. R. 25.
2. (1892) I. L. R. 19 C. 660.
3. (1906) 8 Bom. L. R. 400.
4. (1910) I. L. R. 35 B. 79.
5. (1917) 32 M. L. J. 505.

But there being no question of possession and dispossession in such a case, the Privy Council in *Chelikani Rama Rao's case* lay down that the test of Art. 144 would apply, that is, it would be sufficient if the defendant proves anterior title and if the plaintiff seeks to displace it by a prescriptive title "the onus of establishing possession for the requisite period would rest upon the plaintiff."

In the application of the principles stated above to proceedings under the Madras Forest Act, some difficulty is created by the scheme of that Act, practically imposing upon a claimant in afforestation proceedings, the burden of proving his title. If at the date of the initiation of proceedings the claimant is in possession, the case would under ordinary circumstances be governed by the analogy of Art. 142. But as the Act entitles the State to reserve any land at the disposal of the Government and as land which is *prima facie* the property of the State won't cease to be at the disposal of the Government by the mere fact of somebody being in possession unless that possession had continued for the statutory period, it would seem to follow that the person objecting to the reservation must show possession in himself for the statutory period. This is evidently the reason why their Lordships observe that "objectors to afforestation, preferring claims are in law in the same position as persons bringing a suit in an ordinary court of justice for a declaration of right". In this view the observations in *Secretary of State for India* v. *Bapanamma Garu* [1] in so far as they seem to apply even to property *prima facie* belonging or shown to belong to the State must be taken to be no longer good law. But the question of the effect of long possession by the party in throwing upon the Government the onus of proving that the land sought to be dealt with is land belonging to it or at its disposal must be carefully distinguished from that of proving a title by adverse possession (cf. *Haidar Khan* v. *Secretary of State* [2].)

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1. (1895) I. L. R. 19 M. 165. 2. (1908) I. L. R. 36 C. 1.

SUMMARY OF ENGLISH CASES.

Megaerditchian *v.* **Lightbound**: (1917) 1 K. B. 297.

Solicitor—Lien—Documents obtained by negotiation without litigation—Principle of solicitor's lien at common law.

The lien of a solicitor at common law was a charge enforced by the court in the cause, and its existence depended upon the power of the court to make the other party pay again if he paid direct to his adversary with notice of the attorney's claim. It did not rest, like a true lien, on possession at all. *Held*, therefore, that a solicitor had no lien upon the fruits of a mere negotiation conducted by him.

Horwood *v.* **Millar's Timber and Trading Co. Ltd**: (1917) 1 K. B. 305 C. A.

Restraint of Trade—Contract in—Test—Validity—Contract restraining contractor's liberty of action and property—Part of contract when enforceable—Future wages—Assignment—Effect.

In this case, the Court of Appeal unanimously declined to uphold a mortgage bond by which, in consideration of a sum of cash, the mortgagor in effect made himself the slave of the mortgagee. In the course of his judgment Lord Cozens-Hardy, M. R., observed: " If as a matter of construction I have come to the conclusion that the contract is one which puts the covenantor in the position of *adscriptus gleabae* on the ground of public policy the law will not recognise such a thing. No one has a right so to deal with a man's liberty of action as well as his property, and the law says it is contrary to public policy ".

Observations of *Warrington, L. J.*, on the effect of an assignment of one's future wages. All the members of the court relied upon and followed the observations of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (1913) A. C. 745 as to the circumstances under which part of a covenant in restraint of trade will be enforced even though the covenant taken as a whole exceeds what is reasonable.

Kirklinton v. **Wood.**—(1917) I. K. B. 332.

Lease—Construction—Covenant to do specific repairs in particular year if lease should then be subsisting — Provision in lease for termination thereof by lessee during currency of year on notice—Termination of lease by lessee during currency of year—Effect on obligation to perform covenant—Liability for damages for non-performance.

The question for decision in this case was whether, where a lease contained a covenant to execute specific repairs in a particular year, if the lease should then be subsisting, the lessee was relieved of his obligation to perform the covenant by the fact that he determined the lease by notice expiring before the end of the year. The lease in question provided that if the lessee should during the continuance of the term die and if his executors should give to the lessor six calendar months' notice to determine the lease on March 1st in any year of the term the demise should cease immediately after the expiration of the notice. The lessee died in 1915 and his executors gave six months' notice to the lessor to determine the lease on March 1, 1916 and omitted to perform the covenant. In an action for damages brought by the lessor on the determination of the term *held*, that the executors were liable because the obligation to perform the covenant attached to them as soon as the year commenced and because, though ordinarily they would have had the whole year to perform it, they placed it out of their power to do so by giving a notice expiring before the end of the year.

The question as to what would have happened if the lessor had given the notice was raised but not considered.

Healy v. Howlett: (1917) 1 K. B. 337.

Contract—Sale of goods—Appropriation—Passing of property—Conditions.

A entered into a contract with B for the sale of 20 boxes of a certain article, a term of the contract being that the boxes were to be sent to B at Station X. In pursuance of the contract A consigned by Railway 190 boxes of the article with instructions to the Railway Company at Station X to deliver 20 of the boxes to B and the remainder to two other purchasers. After placing the boxes on Rail A sent an invoice to B which stated " At sole risk of purchaser after putting boxes on Rail here." On arrival of the boxes at Station X an official of the Railway Company, in accordance with A's instructions, picked out and earmarked twenty boxes to B and the remainder to the other purchasers. The boxes earmarked for B were damaged because of the delay in their arrival, the article was not in a merchantable condition and B refused to accept the boxes. In

an action by A to recover the price of the boxes, two questions arose for decision (1) whether the property in the article passed to B; and (2) whether the article was at their risk after being placed on Rail by A. On the second question, *held*, that as the contract was complete before the invoice was sent to B and B had not assented to the condition on the invoice, the condition formed no part of the contract and the article was not at the risk of B. On the first question, *held*, that as there had been no appropriation of the twenty boxes by A when he put them on Rail and as delivery to the Railway Company of 190 boxes did not pass the property in any particular twenty boxes to B, the property in them did not pass to B; he was not bound by the selection of the Railway Official; and, as the article was damaged, he was not bound to accept it and A could not recover the price.

Per Ridley, J: The essence of the authorities which decide that appropriation of goods to the contract by delivery to the carrier at the beginning of the transit may be sufficient to pass the property is that it should be known to whom the goods are appropriated, and not that the question as to who is to bear any loss that may happen should be open to any discussion or be determined by accident.

The goods become the property of the consignee and are at his risk so soon as they are marked off by some distinct act as his, and not the seller's and are delivered to the carrier as the agent to complete delivery to the purchaser.

Hurst v. Evans: (1917) I. K. B. 352.

Insurance Policy—Liability under—Exemption in cases of loss by theft or dishonesty of servant in exclusive employment of assured—Proof of inaction on policy—Onus—Quantum—Civil and Criminal Cases—Sufficiency and admissibility of evidence—Distinction.

Where by a policy of insurance underwriters insured the assured, a jeweller, against loss of or damage to jewellery arising from any cause whatsoever save and except breakage and save and except loss by theft or dishonesty of any servant in the exclusive employment of the assured, *held*, in an action upon the policy by the assured against one of the underwriters, (1) that the onus was on the plaintiff to allege facts to show that the lost goods were covered by the policy, that the loss was one against which

the defendant had agreed to indemnify the plaintiff and therefore that the goods were lost by theft by some person other than a servant in his exclusive employment, and (2) that even if the onus was on the defendant to prove a theft by the plaintiff's servant, the evidence need not be such as would be sufficient to convict the servant in a criminal prosecution.

Observations on the distinction between the sufficiency and admissibility of evidence in a civil case and in a criminal case arising out of the same matter.

The King *v.* Naguib: (1917) 1 K. B. 359.

Criminal Law—Bigamy—Indictment for—Plea of invalidity of earlier marriage on ground of a prior foreign marriage—Proof of foreign marriage.—Nature of evidence required—Foreign marriage according to law permitting polygamy—Validity in England.

Where a person, who was an Egyptian by birth and a Mahomedan by religion but was not specially conversant with the laws of Egypt, was indicted for marrying a woman in England during the lifetime of another whom he had also married in England and pleaded the invalidity of the first marriage on the ground that he had prior thereto married an Egyptian woman according to the Mahomedan religious law, *held* that it was incumbent on the prisoner to establish the marriage in Egypt by the evidence of some person conversant with the marriage laws of Egypt and that the evidence of the prisoner himself of the performance of a ceremony was not enough.

Quaere whether an Egyptian marriage according to the Mahomedan religious law which permits polygamy will be regarded in England as a marriage.

Macmillan *v.* London Joint Stock Bank, Ld.: (1917) 1 K. B. 363.

Banker and customer—Duty of customer—Forged cheque—Alteration of amount—Payment by bank—Customer's suit to recover amount of cheque—Maintainability—Liability of banker—Negligence of customer—What constitutes.

The relationship of banker and customer creates a duty owing by the customer to the banker. Apart from contract or course of dealing between the parties, the duty is that the customer must take reasonable care not to mislead the bank. For negligence in discharge of that duty the customer may be held responsible,

But the negligence must be negligence in, or reasonably connected with, the transaction itself. The question as to what constitutes negligence is one of fact to be arrived at by a consideration of the surrounding circumstances. When the only negligence suggested against the customer is the fact that he has given an opportunity for a clerk to commit forgery, such negligence is not sufficient to make the customer liable. *Quaere* whether a customer is ever liable in a case of an altered cheque unless he has by some contemporaneous or subsequent act or document misled the bank into paying on it.

The action was to recover a sum of 235£ which plaintiffs alleged had been paid by the defendant bank out of their account on a forged cheque. The cheque in question was one which was not entirely forged but which after signature had been altered and raised to a greater account than that for which it was intended to be drawn. The trial judge found as a fact that the plaintiffs were not guilty of any negligence which misled the bank and that if they were guilty of any negligence it was not negligence which caused the loss. The plaintiffs trusted a clerk whom they had no reason to suspect and the clerk made the said alterations. *Held* that, in the circumstances of the case, the plaintiffs were not disentitled to recover the amount of the cheque.

Neville v. London Express Newspapers, Ltd.: (1917) 1 K. B. 402.

Maintenance of suit—Action of—Onus on Plaintiff—Proof—Quantum—Maintained action successful—Effect—Damages, measure of.

A plaintiff in order to succeed in an action of maintenance must prove not only that the defendant has assisted in the bringing of the suit but that he has done so without lawful justification or excuse. It is not correct to say that the action must fail unless the defendants had no reasonable or probable cause for believing in the rights of the plaintiffs in the Chancey actions. The plaintiff is entitled to recover damages notwithstanding that in the Chancery actions against him the plaintiffs were successful. With regard to the amount of damages, the plaintiff is entitled to the costs incurred by him in defending the Chancery actions as between solicitor and client and also the costs as between party and party which he was ordered to pay to the plaintiffs in those actions.

An action for maintenance will lie against a limited company.

JOTTINGS AND CUTTINGS.

The Court of Cassation:—A standard authority thus defines the powers of the Court of Cassation.

A supreme tribunal whose duty to annul or to affirm the decision of the intermediate Appellate Courts. The court was originally instituted under the title Tribunal de Cassation by decree in 1790, and by another decree, 28th floreal an. XII, it received its present title, Court de Cassation. The court consists of forty-nine judges—a first president, three presidents of chambers, the senior of the forty-five remaining judges being known as the doyen. The Court of Cassation has its own bar, consisting of sixty members, veritables officiers ministeriels, who act both as avoues and avocats.

Judges are generally chosen from among the first president and procurators-general of the various courts of appeal, the presidents of the Chamber of Paris, professors in the law faculties of the universities, high officials of the ministry of Justice, and from the avocats practising before the Court of Cassation.

In audiences solennelles the judges wear red robes over a gown (simarre) of black silk, a ceinture of red moire relieved with gold, and a toque of black velvet, also relieved with gold. On ordinary occasions a robe of black silk is worn. On high occasions the presidents wear ermine over their robes. The court sits in Paris, sometimes in camera, such sittings being generally connected with disciplinary measures:—50, *American Law Review*.

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Lawyers at the Imperial Conference:—How large a part lawyers take in the government of the Empire will be signally shown at the Imperial Conference. All the dominions, with the single exception of New Zealand, will be represented by lawyers, Australia by Mr. W. M. Hughes and Sir W. H. Irvine; Canada by Sir Robert Borden; Newfoundland by Sir Edward Morris; South Africa by General Smuts; and India by Sir S. P. Sinha. Of the fourteen Colonial and Indian statesmen who will attend the Conference, six, therefore, are men practised in the law. The Conference, which will, of course, be presided over by Mr. Llyod George, will be an unexampled demonstration of the

great part now played by the lawyer in politics.—*Law Journal, 24th February 1917.*

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Women as Solicitors:—Undeterred by the overwhelming defeat of the recent attempts to secure an expression of professional opinion in favour of the admission of women to the legal profession, Lord Buckmaster has introduced into the House of Lords a Bill to enable women to practise as solicitors. The operative clause of the Bill runs:—

A woman shall not be disqualified by sex or marriage for being admitted as a solicitor or for acting or practising as a solicitor under the Solicitors Act, 1843, and the Acts amending the same, and the other enactments for the time being in force relating to solicitors.

Lord Buckmaster, when he moves the second reading of his Bill, will find it difficult to resist the contention, made so effectively both in the Inner Temple Hall and the Law Society's Hall, that the proposal is untimely. Both branches of the profession have made it clear that they do not favour the proposal. There is no public demand for it. Even if it could be shown that the war had so diminished the ranks of practising solicitors that there were not enough men to do the legal work of the country, the ex-Lord Chancellor could hardly claim that his bill comes within the category of emergency legislation. No woman could practise as a solicitor until she had spent at least three years in becoming qualified. There are many men, no doubt, whose opinions on the admission of women to the legal profession have been affected by the large and the useful part which women are now playing in affairs of national importance. We shall be surprised, however, if the House of Lords does not adopt the view that it would be unbecoming to make any fundamental change in the membership of either branch of the legal profession while all its younger members are fighting in their country's cause. *Ibid.*

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The Exclusion of the Lawyer:—For some time past there has been a tendency on the part of Government Departments to eliminate the lawyer —'eliminate' used to be the favourite phrase —even from enquiries of a semi-judicial kind. Another instance

of this tendency is afforded by a circular which as recently been issued by the War Pensions Statutory Committee, stating that certain Advisory Wages Boards have been constituted by the Board of Trade to deal with the question of the wages to be paid to disabled soldiers and sailors employed by the Government, and intimating that any ex-soldier or sailor whose case is being considered by a Wages Board may be represented by any person *not* being a solicitor or barrister. From the professional point of view, no objection can be raised to non-legal persons being given a right of audience before such a body. It is not unreasonable in inquiries of this character that a man should be represented by any person who, in his judgment, is competent to give him the assistance he needs. The exclusion of the lawyer is to be condemned precisely because it violates this reasonable rule. An ex-soldier or sailor, whose case presents features of unusual difficulty, may have no friend who is capable of putting it properly before the Board. Why should he be unable to make use of the professional help which is at his disposal? All these restrictions, indeed, are calculated to produce hardship in a certain number of cases and ought to be protested against on public even more than on professional grounds.

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Women as Solicitors:—Lord Buckmaster has succeeded in inducing the House of Lords to give a second reading to his Bill for the admission of women as solicitors. Apart from the ex-Lord Chancellor, the Law Lords who spoke on the Bill were equally divided in opinion, Earl Loreburn and Lord Sumner supporting it, and Lord Finlay and Lord Halsbury opposing it. Even if the Bill passes its final stages in the House of Lords it is highly improbable, we imagine, that the House of Commons will have either the time or the inclination to discuss it. That House has strictly confined its legislative activities to matters directly connected with the war, and even Lord Buckmaster was obliged to admit that his bill could not be classified as an emergency measure. No attempt was made by the supporters of the Bill to deal with the reasonable view of the Law Society to which the Lord Chancellor gave the weight of his authority that, in the absence of so many young solicitors on military service, it would be unseemly to make any fundamental charge in the conditions on which the profession can be joined,

Lord Buckmaster suggested that the attitude of the Law Society has been prompted by a narrow feeling of trade unionism. It has, on the contrary, been inspired by an obvious feeling of fairness to the thousands of young solicitors and articled clerks who have responded—nearly all of them voluntarily—to the nation's call. Lord Sumner chose to treat the question as merely involving the fitness of educated women to 'prepare a will, a marriage settlement, or an affidavit.' He forgot that women, if they were admitted as solicitors, would be qualified to practise as advocates in the County Courts, and to oppose members of the Bar there. That, indeed, is one of the chief reasons why it is so undesirable and impracticable to propose the admission of women to one branch of the profession without considering, at the same time, their claims to practise in the other.—*Law Journal, March 3.*

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Miscellany:—Although I have had to reject—with success in at least one instance—the 'judgments', in peerage cases, of some former Lord Chancellors, it may seem rash to take the field against ten at once. But when Lord Buckmaster asserts in the House of Lords that 'at one time a woman sat on the woolsack, but, possibly through lack of legal training, administered a wholly unprecedented form of justice,' and when Lord Halsbury admits that it was true that a woman had sat on the woolsack, but she had to adjourn the proceedings and go away, in order to become the mother of Edward I,' one may really be excused for stating the facts, though to lawyers, I fear, they are much less interesting than the things they read in books. When Henry III left for Gascony in July 1253, he made his Queen Regent of the realm with his brother Richard as her colleague. In May 1254, the Queen herself left to join the King in Gascony. Between these dates, on September 9, 1253, pleas were heard, apparently at the Exchequer, 'Coram Domina Regina et consilio Domini Regis', the queen acting, in the words of Maddox, *vice regis*, that is, as regent. That she acted judicially, either as Chancellor or as Keeper of the Seal, is a pleasant fiction for which, I believe, we have to thank yet another Lord Chancellor, namely, Lord Campbell. Both the learned Lords have yet, I gather, to discover that the Chancery in 1253 was not a Court of Justice and neither heard nor determined causes. The City of London's

'mutiny' against Queen Eleanor, which according to Lord Buckmaster, was provoked by her strange law, took place 10 years later, and the birth of Edward I.—though Sibyl Giffard acted as midwife on that occasion—took place, it may surprise Lord Halsbury to learn, in 1239, not in 1253. The woman Chancellor, it will have been seen, may take her place with 'Pope Joan' among the curiosities of history.—*Law Journal.*

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The French Court of appeal has quashed the conviction of a wife for sheltering her husband who had deserted from the Army. The reasons seem to have been that she was not entitled by law to prevent her husband entering and staying in his own house, that she was under a legal obligation to remain in the conjugal home, that she had not instigated the desertion, and that it would be unfair to expect her to perform her civil duty of denouncing the deserter.—*The Law Student Journal.*

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The following Will, omitting formal parts, has recently been proved:—

'Tis said in holy psalm that men decay,
When decades seven of years have passed away,
And age that runs beyond this wonted span,
Brings little of delight to lingering men.
As years full sixty-four, alas! have gone,
Since I this earthly scene first looked upon,
The time, I trow, will soon arrive when I
To this surprising world shall say, Good-bye!
So, where my mind remains quite sound and clear,
My will shall be distinctly stated here.
I give my wife, when life I leave behind,
My property of every sort and kind;
A further point I also duly fix—
I make my wife my sole executrix;
But, if she will, she may to those who have been
Faithful to me through any crucial scene
Some to ken give from my possessions small
Which me to their remembrance shall recall.
My body, when it seems of life bereft,
I wish examined by a Doctor deft;
Let him determine by some test well-known

That I am just as dead as any stone.
I care not, 'ere the vital spark has fled,
To make a close acquaintance with the dead.
No mourning garments need for me be worn
When I set out for "undiscovered bourne."
But this does not imply I do not prize
The tear which gathers in affection's eyes.

Ibid.

CONTEMPORARY LEGAL LITERATURE.

In *the Juridical Review for December*, Mr. Holdsworth gives an interesting sketch of the Early History of Commercial Societies in England down to the passing of the Bubble Act of 1720. He treats the subject under three heads (i) Early forms of commercial associations, (ii) the application of corporate idea to commercial societies, (iii) the commercial companies and partnerships of the seventeenth century. The two early forms of commercial association which have left their traces upon the later law are (a) the gild (b) and the mediæval contract of partnership. The gild was a sort of brotherhood. Membership came by birth or apprentice-ship and the members had to take the oath of fidelity. They were penalised if they did not attend the meetings. On fixed occasions they had feasts. We see these features in the early trading companies, for instance in the East India Company. More exclusively commercial influences come from the mediaeval contract of partnership. The first of these partnerships was the *commenda*, the second *societas*. The *commenda* was an arrangement under which a partner at home advanced money for a venture carried out abroad by the other partner. It was one of the devices adopted for avoiding the usury law. This form did not take root in England; it had greater vogue on the continent and has been revived in England in the Act of 1907. *Societas* was a more permanent association than *commenda*. From its permanent solidarity the law partially gave the following attributes to it (a) that each partner represented others (b) that each was personally liable without any limitation to all the creditors of the firm. The Scotch and continental jurists imputed legal personality though the English Law stopped short of it by reason of the introduction of Joint Stock Companies.

Before the beginning of the sixteenth century English Law had acquired some knowledge of corporate personality and during the 16th and 17th centuries considerable progress was made in the development of the law and the advantages of the system, especially in relation to foreign trade were soon felt and led to its large adoption. It was, however, in the seventeenth century with the rise of the Joint Stock Company formed to conduct jointly some specific trade that the commercial advantages of incorporation began clearly to appear.

Its advantages were (i) perpetual existence, (ii) facility in taking legal proceedings, (iii) even against its own members, (iv) possession of common seal to authenticate common transactions, (v) continuity of management, (vi) management by majority, (vii) transferability of shares, and (viii) Limitation of liability. The creditors had no right of direct recourse against the member but by what was called *leviation*, the creditor could reach the members by compelling them to pay their dues to the company. The Bubble Company led to declaring the Joint Stock Companies illegal unless they were duly incorporated by statute or charter.

Another interesting article in the same journal deals with the divorce statistics and some of the reforms recently suggested in the divorce law. Divorces seem to be largest in the United States of America. It appears partly due to the modern spirit in America to the composite character of its population, their reluctance to be bound by the past, and the vague search after a new and ideal state of society. Roman Catholicism operates strongly against, in fact all Church influences are against divorce though they do not all operate equally strongly. These divorces seem to be largest before child birth and in early years of married life. The new theory of marriage dissoluble at will is having some influence.

"The ministerial function of Govt." is the heading of another article of general interest. The ministerial function of the state is according to the writer invested with four distinct capacities:

(i) In active capacity carrying out the duties of the Govt.

(ii) In a passive capacity as legal status of Government.

(iii) In a proprietary capacity as receiving, holding, and transfering Crown property and revenues.

(iv) In all its dignity, prestige or reputation involved in the dea of the *Crown*.

In the Harvard Law Review for February a succinct history of Spanish Law and its component elements is given by Mr. Hamilton. The law of Spain in its finished form controls the civil relations not only of the Peninsula but of Central and South American countries, of Porto Rico and the Phillipines. Even to Americans, it is second in importance only to the common law. It is not a mere copy of the Code Napoleon. It is said to be more logical than the French Code. Provision is made for the growth of the law by the rule that if a new case arises, it must be decided according to natural equity. In this law, we find on a Roman foundation Gothic, Moslem, local and maritime elements which nevertheless make up a harmonious whole being the outgrowth of Spanish History. The peculiar contribution by the Moorish law seems to be what is known as conciliation that is to say an attempt at adjustment by the Court before actual trial commences.

The Roman law which forms the basis of the Spanish law is not the Justinian Code but the earlier Roman law. The family law has much of the Germanic element in it.

Mr. Jeremiah Smith continues his discussion about the reclassification of torts. Though in most of the named torts there is the element of fault that is to say wrong intention or culpable inadvertence even there there are exceptional instances of absolute liability. In defamation though fault is generally present, it is not an essential requisite. Similarly in the case of slander of title against strangers. Trespass is according to the writer not an exception. Cases of absolute liability in the absence of fault, which heretofore have been classified as torts may be divided into 3 classes:

1. Liability for culpable mistake.
2. Liability for non-culpable accident.
3. Vicarious liability for the wrongful acts of others. The liability of master for servant's acts comes under the last. It is stated by Professor Salmond that non-culpable mistake is no defence to civil liability. The writer controverts this position and says that this is true only of mistakes as to title to land.

In the case of non-culpable accident the general rule is that there is no liability but there are some so-called cases of extra-hazardous user where a man is said to act at his peril. These are survivals of the time when all a man's acts were done at

his peril. The following are some prominent instances of these:

1. absolute liability of the owner of certain animals for damage done by straying into another's land ;

2. in the case of blasting when substances are thrown on the land of the plaintiff ;

3. for excavating in one's own land with the result of subsidence in the surface of another's land ;

4. for defamatory statements published on unprivileged occasions and not justifiable on ground of truth ;

5. in the action of slander of title against strangers.

As to the following whether there is an absolute liability in those cases also there has been much discussion : (i) Use of fire, (ii) manufacture and storage of dangerous explosives, (iii) collecting and keeping water in a reservoir.

Under the American Law, the rule of non-liability in the absence of negligence is applied to the use of fire for mechanical or manufacturing purposes as to all ordinary domestic or agricultural purposes.

As to (ii) no definite rule is yet established.

As to (iii) the American authority for non-liability is the English Law for liability. Exceptions have however been recognised to *Rylands* v. *Fletcher* even under the English law.

" Voluntary transfers of corporate undertakings " is the ubject of discussion in another article. The discussion centres largely round the question as to how far a corporation has power to dissolve itself. The common law rule was that a corporation could not dissolve itself by its voluntary action but it could surrender its franchise to the Crown and if the Crown accepted it, dissolution would result. The majority could resolve to surrender the charter and unanimous consent was not necessary. Corporations brought into being by a special statute could ordinarily be dissolved only by statute. In England an Act of Parliament dissolving a corporation is effective without more ; in America, till the statute is accepted by the corporation it has no effect. Even here, after a discussion of the authorities the writer comes to the conclusion that the majority has the power to consent to a dissolution.

A writer in *the American Law Review* calls upon the university Law Professors to define and promulgate principles as to the status of legal precedent and as to the policy and technique

of legislation and not be as they have been mere recorders and systematisers of the law. According to him, the chief defects in the American legal system are (i) its inability to adapt itself to changing standards of public policy, (ii) its procedural vices, (iii) its obstructive rule of evidence. The common law was conceived at a time when there were none of the social and economic complications of the present day and is therefore largely unsuited to the modern conditions.

The rule of *stare decisis* makes it difficult to progress though there is authority for the position that that rule does not require standing by a decision even after it has become manifestly inexpedient. He pleads therefore for the rationalisation of the doctrine and a socialisation of legal thinking. The writer's observations about the English common law, its jury system and the rules of evidence are far from being Complimentary.

Distinguishing nominal damages from small compensatory damages another writer in the same journal says that while the latter are really compensatory, the former are not damages at all; they exist only in name and not in fact.

BOOK REVIEWS.

A DIGEST OF ENGLISH CIVIL LAW, *by Edward Jenks, M. A., B. C. L. Book V., Succession (contd), Sections II and III Butterworth and Co., London, 1917.*

With this part, the work begun more than twelve years ago, is completed; and we can well appreciate the satisfaction of the editor at having brought his task to a successful termination. It is interesting to recall at the present moment that the work was undertaken at the instance of the Berlin Society for Comparative Jurisprudence, and in fact, the first part of it was published in Germany even before it appeared in England. Few persons who have followed the publication of the work through its several stages can fail to realise the difficulty and magnitude of the task or to appreciate the care and thoroughness with which it has been executed. All may not see eye to eye with the editor, when he claims that the English Law has become a system of world-wide influence "not by force of arms but by willing adoption," but whatever the reason may be, there is no denying its importance at the present day, nor are we disposed to ignore the intrinsic

merits of several parts of the system. In the very nature of things a work like the present can scarcely become a popular hand-book, but that certainly does not detract from its utility in the long run.

The present part deals with the law of Intestate Succession and the principles governing the administration of the estate of a deceased person. As observed by Mr. Colebrooke more than a century ago, "the law of Inheritance constitutes that part of any national system of laws which is most peculiar and distinct" and the peculiarities of English Law are nowhere better seen than in its system of intestate succession to real property. The sections of the present work dealing with that branch of the law are therefore of little more than academic interest in places where the English Law of Succession does not directly apply; but the latter half of the book dealing with "administration of assets" will be found both instructive and useful in this country where the law relating to executors and administrators is substantially based on the English rules. This section is arranged under eight headings dealing respectively with the following heads:—

I. The Personal Representative.

II. The Title and Interest of the Personal Representative.

III. Rights and Liabilities Passing to the Personal Representative.

IV. Assets.

V. The order in which debts are payable.

VI. The order of Resort to Assets.

VII. Duties and powers of the Personal Representative.

VIII. Personal Rights and Liabilities of the Representative.

In respect of a work so carefully and thoroughly done, it is scarcely possible to say anything in the nature of criticism in such a brief review. We cordially commend the book to the profession and to all interested in the study of law.

THE CURRENT STATUTES, 1916.—*First and Second quarters. Published by the Law Printing House, Madras.*

We have great pleasure in announcing the publication of the Current Statutes first and second quarters for the year 1916.

This volume, as the profession is aware, collects together all the Parliamentary enactments and Orders in Council relating to India, the Acts passed by the Imperial and local legislatures in India and the important notifications, rules and orders made under them. We need not repeat what all we said in reviewing the prior volume of this Series; but we must say that the present volume maintains the same high level of usefulness as its predecessors.

SANJIVA RAU'S *Code of Criminal Procedure in 2 Volumes, 2nd Edition, 1917. Law Printing House, Madras.*"

The first Edition of this book appeared in the year 1910 and with the year 1914 the Edition had been sold out and the profession has been eagerly looking for the present Edition. The volumes under review follow the same method of treatment as the Lawyer's Companion Series publications which are found very useful by busy practitioners as books of ready reference. The cases are given down to the end of 1916, under appropriate headings under each section. We have very great pleasure in recommending this publication to all who are connected with the administration of Criminal Justice in this country.